No. _____

_____

In the
SUPREME COURT OF THE UNITED STATES

_____

Gregory Crum, *Petitioner*

v.

United States of America, *Respondent*

_____

On Petition for a Writ of Certiorari to the
United States Circuit Court for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

CARL HOSTLER
Criminal Justice Act Panel Member

Prim Law Firm, PLLC
3825 Teays Valley Road
Hurricane, WV 25526
304-201-2425

Counsel of Record
Attorney for Petitioner

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in determining relevant conduct.

2. Whether Greg Crum should receive a leadership enhancement.

3. Whether the Greg Crum's sentence should be enhanced due to allegedly foreign origin of the methamphetamine at bar.

OPINIONS BELOW

The United States District Court for the Southern District of West Virginia entered judgement on October 6, 2017 in Case No. 2:16-00133-01 and is attached as Appendix p. 1. The United States Circuit Court for the Fourth Circuit denied relief by an unpublished Memorandum Order of July 5, 2018 in Case No. 17-4634 and is attached as Appendix p. 8. The Mandate of the Fourth Circuit was issued on July 25, 2018 and is attached as Appendix p. 12.

JURISDICTIONAL STATEMENT

This appeal is filed within 90 days of the Mandate of the Fourth Circuit, but not within 90 days of the Memorandum Judgement. This Court has jurisdiction pursuant to 28 U.S.C 1254(1).

INTRODUCTION

Gregory Crum was first indicted on July 19, 2016 concerning provision of methamphetamine from his residence in California to individuals in the Southern District of West Virginia pursuant to 21 U.S.C. § 846. Two superseding indictments of him were issued on October 12, 2016 and December 19, 2016 for similar methamphetamine violations. On May 2, 2017, Crum pled guilty without the benefit of a plea agreement to a single count concerning distribution of more than 500 grams of methamphetamine of the second superseding indictment. Mr. Crum was sentenced by the Southern District on August 3, 2017. The Judgement Order was issued on October 6, 2017. The presentence report ("PSR") suggested a sentence of 324 to 405 months. The court departed downward to a sentence of 240 months which is herein appealed. The office of the U.S. Attorney dismissed all remaining counts. A direct appeal was timely filed with the United States Circuit Court for the Fourth Circuit. All requested relief was denied to Mr. C

CONSTITUTIONAL AND STATUTORY PROVISIONS INCLUDED

18 U.S.C. § 3553(a)

U.S.S.G. § 3B1.1

U.S.S.G. § 2D1.1(b

STATEMENT OF CASE

Throughout the case, Mr. Crum has conceded his involvement in the distribution of 15 pounds of methamphetamine. He admits that most of it was pure enough to be considered "ice", but that some of the 15 pounds were not. The sentencing court applied 45 pounds of ice to Mr. Crum based upon the testimony of Joseph Cooper and information gained from others. Mr. Crum disputes the amount supplied to the district court by Cooper.

Crum's addiction to methamphetamine is measured in decades and began at age 17. Mr. Crum is now 42. He grew up in Charleston, WV where he became a scholastic prodigy. He left high school one year early to enter the Resident Honors program at the University of Southern California at age 17. By that time, Los Angeles and the college campus were awash in methamphetamine. His college career diminished as his meth use increased. After about 75 hours of credit, his financing of further education could no longer be met and he dropped out of school. Thereafter, he had years of gainful employment as a computer, video and audio technician. Mr. Crum moved through various jobs in the Los Angeles area and eventually found himself back in Charleston, WV. By the Summer of 2012, his

addiction left him homeless, and he returned to Los Angeles for the sake of being homeless in warmer weather. He continued in this state of homelessness and drug-centered focus for about two years, but eventually found shelter in the home of the parents of Diana Salazar Gamboa, Crum's fiancée and codefendant.

The history of the case originates with Crum delivering cost-effective drugs to friends in the area of Charleston, WV, in an effort to supply his own habit by selling enough product to get his personal use drugs for free. His addiction reached a pinnacle of about one pound per year for personal use. For him, methamphetamine was a drug that made him sociable, feel better and free from the voices he heard from his mental health issues. He believed that his mood was elevated and that he could come out of the fog of his illness to clear thought.

In 2013, Crum reacquainted himself, via social media, with a friend named Joseph Cooper. During the 1990's, Crum and Cooper had become friends by being in a circle of people who were always attempting to find methamphetamine for personal use in the Charleston area. It was an elusive and expensive drug for the addicts in the 1990's. By the time of their reunion in 2013, Crum had been sending some amounts of the drug to friends in Charleston in such quantities to supply his own habit, but not for profit. Cooper found ways to circulate increasing amounts of the drug to Charleston. The large majority of the drugs in this case were brought to Charleston by Cooper. Suddenly, Crum had a way to not just feed his demons, but also to have money.

Early in 2014, Crum transported one-half pound of methamphetamine to Cooper in Las Vegas, Nevada. Crum and a Los Angeles friend had stumbled into six pounds of methamphetamine. Crum told Cooper of the odd circumstance, so Cooper decided to buy the other five and one-half pounds. Cooper drove to Los Angeles and picked up the quantity to transport back to Charleston. This individual transaction was an anomaly. Most transactions between Crum and Cooper involved one or two pounds at a time.

The partnership between Crum and Cooper came to a screeching halt late in 2014 over disputed money. They went their separate ways and Crum ended any involvement with Cooper. Crum continued comparably small shipments to Charleston in 2015 and 2016 until his arrest. Cooper replaced Crum very easily and continued to supply large quantities of methamphetamine to Charleston and also expanded into heroin supply.

SUMMARY OF ARGUMENT

Mr. Crum has long-conceded his offense conduct, but respectfully contests the quantity of drugs attributable to the offense. He maintains that he was not a leader of the conspiracy, but simply a convenient supplier – analogous to a wholesaler or middle man. Further, Crum did not import the drugs in question and does not know the manufacturing source of them. They may have come from Mexico, or they may have come from the United States. Like the government, he simply does not know the source of origin. He did nothing to alter the drugs. Crum merely passed them along to people that he knew who were feeding habits of their own in the same way that he had been prior to and after working with Joseph Cooper. Cooper is the codefendant of Crum and supplier of the majority of relevant conduct held against Crum to the district court. To prevail, Mr. Crum must show clear error.

ARGUMENT

Preface

"It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon v. United States,* 518 U.S. 81,113 (1996). The focus of federal sentencing is no longer an empirical approach within numbered guidelines, but rather is to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2 [of 18 U.S.C.A. §3553(a)]." *United States v. Booker,* 125 S.Ct. 738, 757 (2005). The

sentencing court is purposed to find the seriousness of the offense; means to promote respect for the law; punishment for the offense; protection of the public from the defendant; and, provision to the defendant of training, medical and other correctional treatment. 18 U.S.C.A. §3553 (a)(2). The factors to be utilized by the court in the pursuit of those purposes include the nature of the offense - § 3553(a)(1); the nature of the defendant - §3553(a)(3); and, avoidance of sentencing disparities among convicted defendants with similar records and conduct - § 3553(a)(6).

1. The weight and drug purity applied to Mr. Crum is not reliable evidence by a preponderance. Therefore, the court abused its discretion.

Greg Crum did not manufacture the drugs in this case. He, like the government, has no idea of the origin. Several courts have concluded that purity of methamphetamine is no longer an accurate reflection of a defendant's culpability in those cases where the defendant played no role in the manufacture of the substance. (Judge Bennett calls it a "poor proxy for offender culpability" in *Hayes*). *United States v. Grover, 2017* U.S. DIST. LEXIS 101566, *4-5 (d. Idaho, June 28, 2017); United *States v. Hayes,* 948 F. Supp. 2d 1009, 1015 (N.D. Iowa 2013); *United States v. Hubel,* 625 F. Supp. 2d 845, 853 (D. Neb. 2008). As such, these courts have recognized that the U.S.S.G § 2D1.1 guideline's consideration of purity unfairly creates a disparity among similarly situated defendants and that the methamphetamine guideline ratios should not be entitled to deference. Initially, it seems logical to punish by purity, but there is no support within the legislative

history to explain the formula which ties higher purity with the imposition of higher sentences. *Hayes*, 948 F. Supp. 2d at 1026.

The Supreme Court has held that district courts are authorized to determine the level of deference to be afforded to a particular guideline. *Kimbrough v. United States,* 552 U.S. 85, 108 (2007); *Rita v. United States,* 551 U.S. 338, 350 (2007). The guidelines are the initial benchmark for sentencing in reliance of the Commission's "capacity" to base the guidelines upon "empirical data and national experience." *Kimbrough,* at 108-109. However, not all of the guidelines were tied to empirical research undertaken by the Sentencing Commission, such as in the original 100:1 powder / crack cocaine ratio. *Kimbrough,* at 95-96. Therefore, when a guideline is not the product of "empirical data or national experience," a district court can conclude that the guideline "yields a sentence greater than necessary'". *Kimbrough,* at 110.

Where a defendant, like Mr. Crum, has no influence over the purity of drugs which he sold, then purity no longer becomes a factor to consider the defendant's culpability within the chain of distribution. *Grover*, at *7. It would seem more appropriate to hold those persons responsible for mixing the large quantities of highly pure substances accountable for its purity instead of a street level distributor or wholesaler like Mr. Crum. Therefore, Crum asserts that his case should be treated as a mixture or substance for the calculation of the base offense level in his case, or alternately – serve as the starting point for determining an appropriate variance.

In Crum's case, the district court gave credibility to Joseph Cooper for (1) attributing 50 pounds of methamphetamine to Crum; and, (2) that the entire 50 pounds was "ice", or pure methamphetamine. The only evidence physically present in the courtroom at sentencing was Mr. Cooper's memory – a person with years of substance abuse, an axe to grind with Crum over money, and an obligation to perform for the government in exchange for a heavily reduced sentence.

Crum countered throughout the sentencing process that the amount involved with his case totaled 15 pounds. He conceded that most of it was of a very good quality, but some was not in that it lacked the visible clarity of a pure product and had a yellow color to it.

Notably, the district court began with a total offense level of 41, criminal history category of I, and concluded a sentencing range of 324-405 months. The court then considered the low criminal history, efforts to overcome mental health issues, and addiction to methamphetamine as the impetus for his involvement in distribution as reasons to vary downward three levels to a sentencing range of 235-293 months. The district concluded that 240 months was a sentence that was sufficient but not greater than necessary. *Please see* the district Statement of Reasons. [JA, Vol. 2 at 55] That process resulted in a variance of about 25% in Crum's favor, if the court was proper in the leadership and foreign source enhancements.

If Crum's position were adopted, i.e., 15 pounds of meth mixture or 6803 grams, the initial sentencing range begins at level 34 with a range of 151-188

months. Again, Crum did not produce any product in this case. He did not take anything across any border. He had a flaming addiction to meth in an effort to self-treat his mental health issues. For him, the substance made the voices in his head silent. One main assertion throughout this appeal is that placing a person with mental health issues in prison should be done at the most minimal sentence possible. Mr. Crum asks this Court to review the district's decision on that issue and recraft that most minimal sentence.

"Ice", per USSG §2D1.1, Note (C) "means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity. Of the drugs presented by this case, approximately 230 grams attributed directly to Mr. Crum were tested for purity and they were all above 80%. Presentence Report [JA Vol. 2, p. 11]. It should be noted that many of the drugs contained in this case which were laboratory tested had wide-ranging purity levels. 98% at JA Vol. 2, p.11; 99% at JA Vol. 2, p. 11; 91% and 85% at JA Vol. 2, p. 20; 99% at JA Vol. 2 at p. 21; 64% and 72% at JA Vol. 2, p. 22. It should also be noted that not all of those products could be attributed to the wholesaling of Mr. Crum. Likewise noted, is that 2 or 3 pounds of the product that Crum supplied to Cooper turned out to be fake. [JA Vol.2, p. 27] Therefore, leaping to the summary conclusion that it was "all ice" is a mistake. In light of the minimal amount of laboratory testing that occurred in this case, the presence of lower purity levels, and the presence of drugs that turned out to be fake, it is difficult to say that it is more likely than not that the relevant conduct of Crum should all be labeled as ice.

Mr. Crum does not seek a pardon. His letter to the district court concerning acceptance of responsibility was reproduced in the presentence report. [JA Vol. 2, p. 37] It presents a person who is weary and sorry for what he has done to himself, his fiancée, and his community. What he asks at this stage is judicial recognition of the fact that his involvement pales to that reported in the presentence investigation.

2. The factual determination that Mr. Crum should receive a leadership enhancement is clear error.

The district court places Mr. Crum at the "apex of the conspiracy in this case, which had two prongs..." [JA, Vol. 2, at 55] The court considered one prong to be Cooper and the other prong to involve several friends of Crum in the Charleston, WV area plus Cooper and Crum's fiancée, Diana Gamboa. The court concluded that "[Crum] decided what to buy, what was to be paid for it, to whom to sell and what was to be paid by the purchaser." *Id.* The court continued that Crum "recruited the few accomplices that he needed," "received the larger share of the fruits of the scheme," "planned and organized the offense," and "exercised control and authority over all others who participated with him." *Id.*

Whether a role in the offense enhancement is proper is a factual determination, which is reviewed on appeal for clear error. *United States v. Thorson,* 633 F.3d 312,317 (4th Cir. 2011); United *States v. Cameron,* 573 F.3d 179, 184 (4th Cir. 2009). The Fourth Circuit has explained USSG § 3B1.1 enhancements in *United States v. Sayles,* 296 F.3d 219 (4th Cir. 2002). It was noted that the sentencing provision provides an extra four points for an organizer or leader of five

or more participants, or whose influence was otherwise extensive. §3B1.1(a) Section (b) of that guideline provides for a three-point enhancement for a defendant who was a manager or supervisor, but was not an organizer or leader. Finally, section (c) adds two points in the event that a defendant "was an organizer, leader, manager, or supervisor in any criminal activity other than that discussed" in sections (a) and (b).

Seven factors are to be utilized in the analysis of the enhancement: the exercise of decision making authority; the nature of participation in the offense; the recruitment of accomplices; the claimed right to a larger share of fruits of the crime; the degree of participating in planning or organizing the offense; the nature and scope of the illegal activity; and, the degree of control and authority exercised over others. *Cameron,* 573 F3d at 184; and, *Sayles*, 296 F.3d at 224.

Mr. Crum would like the Court to understand that very little of this was organized in any way. It began in 2012 while he was homeless, eating out of dumpsters, untreated for mental illness and in the throes of addiction. A mentally ill person with a large methamphetamine habit plans little other that the acquisition of his next drug use. Ties with old friends led him to mail methamphetamine that was cheaper in Los Angeles than it was in Charleston, WV. There was no recruitment. Someone would call Crum. Crum would go find the drugs to fill the request and then mail the product to the requestor. There was no plan or large economic goal other than feeding his own large habit for free. Crum supervised no one. The only decisions that he had to make were how to find the

drugs to fill a request, how to get money delivered to him, and how to mail the results.

As time wore on, Cooper entered the picture and had the ability to distribute large amounts to those beyond Crum's habit-feeding friends. Crum's original transaction with Cooper was to be for one-half pound of methamphetamine which he was to deliver to Cooper in Las Vegas. Just by chance, Crum and another friend in Los Angeles had been given six pounds of methamphetamine which they stored in a storage locker. He and the unnamed friend had an agreement to get rid of it as best they could. Just by chance, Cooper said that he was in a position to acquire those drugs. The pair returned to Los Angeles where Cooper picked up the drugs and returned to Charleston. In sum, as is typical for the addicted and ill person, things just happened. There was no plan or control.

The *Sayles* court reversed a district decision which imposed a four-level enhancement to one defendant and a two-level addition to another defendant by concluding that the defendants "bought and sold crack" and that there was no other reason to apply the additions. Id., at 225. The court found that "being a buyer and seller of illegal drugs, even in league with more than five or more other persons, does not establish that a defendant has functioned as 'an organizer, leader, manager or supervisor' of criminal activity. Id. In this case, Crum bought and sold methamphetamine. He sold to multiple people, but in no way, did he organize, lead, manage or supervise those people. What the customer did once the Crum delivery occurred was completely out of his hands.

Many people provided information to the government against Mr. Crum. None of them mentioned that Crum sought them out, or recruited them. To the contrary, it was the individuals who sought Crum. He was essentially a middle-man to inexpensive drugs. Even Cooper acknowledged in his testimony that Crum never had any influence over what Cooper did with the drugs once they were in Cooper's hands. [JA, Vol. 1 at 88]. All transactions between Cooper and Crum were done on a cash basis. [Id.] There were no profits to be divided or anything of the like. Drugs and money were exchanged at the same time.

For those reasons, it is submitted that the district court clearly erred and that such error is not harmless. The leadership enhancement adds five years to the sentence (the difference between base offense levels 34 and 38).

3. The national origin of the drugs attributed to Mr. Crum is unknown.

Mr. Crum received a two-level enhancement based upon the Court's finding that the drugs he wholesaled originated from Mexico. USSG § 2D1.1(b)(5) In reaching that determination, the Court relied solely upon Mr. Cooper's testimony that Crum had told Cooper the methamphetamine came from Mexico in liquid form. Statement of Reasons [JA Vol. 2, p. 55]. That is the entire evidence. Cooper's testimony:

Q. Did you see Greg Crum handling any transactions between any of his sources?

A. No, sir.

Q. So you have no idea where the drugs came from?

A. No, sir.

Q. But you had conversations with Crum to the effect of, well, the stuff comes up in liquid form from Mexico, right?

A. Yes, sir. [JA, Vol. 1 at 91]

In sum, two seriously-addicted persons had a conversation. One of them spread a rumor. That rumor was provided to the government via testimony and the result is a sentence that is extended by years.

To this writer's knowledge, this Court has not issued a decision on the threshold to be met for the increased sentence for foreign importation. The guideline enhancement was added in 2007 for a defendant convicted under 21 U.S.C. § 865 of smuggling methamphetamine or precursor chemicals through a commuter lane or other facilitated entry program at the border administered by the government. USSG Appendix C, Amendments 705, 706, and 711. The Fifth Circuit has held that the enhancement does not require knowledge that the meth was imported. *U.S. v. Serfass,* 684 F.3d 548 (5th Cir. 2012). It is acknowledged that the enhancement is not just limited to those who actually transport the meth across the border. *U.S. v. Perez-Oliveros,* 479 F.3d 779 (11th Cir. 2007) Those points are all well-taken, but the fact remains that there is nothing in the present record to indicate the origin of these drugs outside of two drug addicts having a flippant conversation. Was Crum trying to make himself sound important to Cooper, and nothing more? That, too, is a reasonable conclusion to be made from the circumstance. It should be recalled that Crum and Cooper parted ways in late

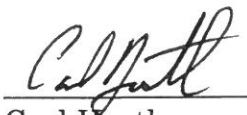
2014. Cooper became Crum's source for money in amounts that Crum had not previously seen. The record certainly indicates that Cooper replaced Crum by personally going to Mexico after the separation from Crum. But that post-Crum activity cannot be attributed to Crum. The border enhancement in this case is based upon hearsay from a criminal informant with an axe to grind with the appellant. The government provided no other evidence. Such a holding fails the reasonableness our system requires per *Booker*. *U.S. v. Booker,* 543 U.S. 220 (2005) Such a holding rises to the level of clear error.

CONCLUSION

At the plea stage of this case, Crum understood that he was signing away at least ten years of his life. At the presentence report stage, he saw that over 30 years could result. The district court found 20 years to be sufficient and not excessive. One has to wonder how much more are we really accomplishing by putting a mentally ill person in jail for 20 years instead of ten? In ten years, Crum will be over 50, that age where recidivism rates substantially drop. Will holding him until he is in his 60's really protect the public anymore? The questions are made more relevant when drug purity really is a poor proxy for criminal culpability; when a foreign source is concluded by guess work; and, when leadership is attributed to someone who led no one.

For the above reasons, Gregory Crum would respectfully request that his sentence be vacated and that he be remanded to the Southern District of West Virginia for further sentencing

GREGORY CRUM, by counsel



Carl Hostler WV Bar ID 5248
Prim Law Firm, PLLC
3825 Teays Valley Road, Suite 200
Hurricane, WV 25526
304-201-2425
chostler@primlaw.com

October 23, 2018

CERTIFICATE OF SERVICE

It is certified that this Petition for Writ of Certiorari of the Petitioner and Appendix were sent by first-class U.S. Mail to the Court and to the United States of America on October 22, 2018 to the following:

AUSA Philip H. Wright, Esquire
United States Attorney
300 Virginia Street, East
Charleston, WV 25301

Carl Hostler